Public Prosecutor v Chap Jee & Ors

HIGH COURT (KOTA BHARU) — CRIMINAL REVISION NO 43–12–06 OF 2013
AZMAN ABDULLAH J
3 JULY 2013

Criminal Procedure — Revision — Application to revise magistrates's order — Correctness, legality or propriety of order — Regularity of proceedings — Human trafficking — Protection order — Only report from protection officer furnished — No report prepared by investigating officer — Whether magistrate erred in granting the order — Whether magistrate erred in saying that he was satisfied that the subjects trafficked persons and in need of protection — Whether subjects trafficked persons and needed protection — Whether sufficiently evaluated — Whether decision of granting protection order not properly arrived at — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 51 — Criminal Procedure Code s 323

Immigration — Detention — Protection order — Purpose of protection — Whether subjects trafficked persons and needed protection — Whether elements of trafficked person sufficiently evaluated — Whether decision of granting protection order was properly arrived at — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 41A, 44(2) & 51(3)

The application herein was to determine the correctness, legality or propriety of the protection order made by the learned magistrate pursuant to s 51(3) of the Anti-Trafficking in Person and Smuggling of Migrant Act 2007 ('Act') in respect of four Myanmar males. In this case, the car driven by one Malaysian was stopped and the four subjects as passengers were arrested pursuant to the provisions of the said Act as they had no traveling documents. Pending investigation, the learned magistrate granted an interim protection order. Subsequently, on an application by the investigating officer, the learned magistrate granted the protection order for three months pursuant to s 51(3) of the Act. During the proceedings at the magistrate's court, only a report from protection officer was furnished. Unfortunately, however, this report did not disclose anything about the circumstances of trafficking in person. Further, no report was prepared by the investigating officer even though a 14 day interim protection order was granted under s 44 to enable them to investigate into the circumstances of the subjects for the purpose of determining whether they were trafficked person under the Act. Before this court, the point of law for consideration was whether the protection order under s 51 of the Act applied to

A these four subjects and whether the protection order under s 51(3)(a)(ii) of the Act should in the first place be granted.

Held, allowing the application and setting aside the protection order:

B (1) The magistrate had erred in law in granting the order as he had only assumed that those subjects needed protection, after receiving the report from the officer without scrutinising and examining the details of the report tendered. Receiving the report alone was not sufficient. On the surface of the record, the magistrate erred when he considered that he was C satisfied that the subjects were trafficked persons and in need of protection, whereas the report on that matter was never offered. By doing so, the magistrate was not exercising his judicial mind (see para 8).

(2) The report from the investigating officer was of utmost importance beside one from the protection officer as it would disclose the D circumstances and activities of the subjects and from there the magistrate could ascertain whether the subjects were trafficked person and whether they were in need of protection or not. Since there was no report from the investigation officer, the consideration of whether the subjects were trafficked persons and needed protection was not sufficiently evaluated E and the decision of granting the Protection Order was therefore not properly arrived at (see para 9).

(3) Considering the phrases 'trafficked person' and 'in need of protection' as stated in s 51(3) of the Act, the magistrate had no basis to decide that F there were grounds to be satisfied that the subjects should be protected. The magistrate has to put his mind and evaluate whether at the very least, on the surface of the report tendered during the application, whether the facts revealed some circumstances which showed the subject was a trafficked person and needed protection (see para 9).

G **[Bahasa Malaysia summary**

Permohonan ini adalah untuk menentukan ketepatan, keesahan atau kewajaran perintah perlindungan yang dibuat oleh majistret yang bijaksana menurut s 51(3) Akta Antipemerdagangan 2007 ('Akta') berkenaan dengan H empat lelaki Myanmar. Dalam kes ini, kereta yang dipandu oleh seorang warganegara Malaysia telah ditahan dan empat orang penumpang telah ditangkap menurut peruntukan di dalam Akta itu kerana tidak memiliki dokumen perjalanan. Majistret yang bijaksana telah mengeluarkan perintah perlindungan interim sementara siasatan belum selesai. Kemudian, melalui I permohonan oleh pegawai penyiasat, majistret yang bijaksana telah mengeluarkan perintah perlindungan untuk tiga bulan menurut s 51(3) Akta. Semasa prosiding di mahkamah majistret, hanya laporan daripada pegawai perlindungan yang telah dikemukakan. Walau bagaimanapun, malangnya, laporan tersebut tidak mendedahkan apa-apa mengenai keadaan

pemerdagangan orang. Selanjutnya, tiada laporan yang disediakan oleh pegawai penyiasat walaupun tempoh 14 hari perintah perlindungan interim telah diberikan di bawah s 44 untuk membolehkan mereka untuk menyiasat keadaan orang yang diperdagangkan tersebut untuk menentukan sama ada mereka telah diperdagangkan menurut Akta. Di mahkamah ini, perkara undang-undang untuk dipertimbangkan adalah sama ada perintah di bawah s 51 Akta terpakai ke atas empat orang tersebut dan sama ada perintah perlindungan di bawah s 51(3)(a)(ii) sepatutnya diberikan pada mulanya.

Keputusan, membenarkan permohonan dan mengetepikan perintah perlindungan:

(1) Majistret telah terkhilaf dari segi undang-undang dalam memberikan perintah tersebut memandangkan beliau hanya beranggapan bahawa subjek-subjek tersebut memerlukan perlindungan, selepas menerima laporan daripada pegawai tanpa meneliti dan memeriksa butir-butir laporan yang dikemukakan. Penerimaan laporan tersebut sahaja adalah tidak mencukupi. Majistret telah terkhilaf pada permukaan rekod tersebut apabila beliau beranggapan bahawa beliau telah berpuas hati bahawa subjek merupakan orang yang diperdagangkan dan memerlukan perlindungan, sedangkan laporan tentang perkara tersebut tidak pernah dikemukakan. Dengan berbuat demikian, majistret tidak melaksanakan minda kehakimannya (lihat perenggan 8).

(2) Laporan daripada pegawai penyiasat adalah penting daripada laporan oleh pegawai perlindungan kerana ianya mendedahkan keadaan dan aktiviti-aktiviti subjek tersebut dan daripadanya majistret dapat menentukan sama ada subjek merupakan orang yang diperdagangkan dan sama ada mereka memerlukan perlindungan ataupun tidak. Memandangkan tidak ada laporan daripada pegawai penyiasat, pertimbangan sama ada subjek merupakan orang yang diperdagangkan dan memerlukan perlindungan tidak dinilai secukupnya dan keputusan untuk memberi perintah perlindungan itu tidak diperolehi dengan betul (lihat perenggan 9).

(3) Mempertimbangkan frasa 'orang yang diperdagangkan' dan 'yang memerlukan perlindungan' seperti yang dinyatakan dalam s 51(3) Akta, majistret tidak mempunyai asas untuk memutuskan bahawa terdapat alasan untuk berpuas hati bahawa subjek perlu dilindungi. Majistret telah meletakkan fikirannya dan menilai sama ada sekurang-kurangnya, pada permukaan laporan yang dikemukakan semasa permohonan itu, sama ada fakta mendedahkan beberapa keadaan yang menunjukkan subjek adalah orang yang diperdagangkan dan memerlukan perlindungan (lihat perenggan 9).]

Notes

For a case on application to revise magistrate's order, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 3446.

Cases referred to

PP v Nam Ointhantip [2008] 5 CLJ 285, HC (refd)

Siti Rashidah bt Razali dan yang lain lwn Pendakwa Raya [2011] 6 MLJ 417; [2011] 9 CLJ 459, HC (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 44, 44(2), 51, 51(3), (3)(a)(ii)

Criminal Procedure Code s 323

Wan Azimah bt Yaacob (Deputy Public Prosecutor, Kelantan State Legal Advisor Office) for the applicant.

Azman Abdullah J:

INTRODUCTION

[1] The protection order signed under s 51(3) of the Anti-Trafficking in Person and Smuggling of Migrant Act 2007('ATIPSOM') in respect of four subjects; Chap Jee, (male, 19 years old), Muk Kuae (male, 16 years old), Wu Lat Hue (male, 16 years old) and Thar Wue (male, 16 years old) by the magistrate's court was brought by public prosecutor to the attention of the court as to the correctness, legality or propriety of the said order and the regularity of the proceedings. Section 323 of the Criminal Procedure Code ('CPC') was referred to by the court to call for the record and to examine the record of the protection order proceedings in respect of four subjects.

THE BRIEF FACTS

[2] The four male Myanmar, aged between 16–19 years respectively, were arrested while they were on their way from Rantau Panjang, Kelantan to Kuala Lumpur. The car driven by one Malaysian was stopped and they as passengers were arrested since they do not have any travel documents. They were arrested together with the driver pursuant to provisions ATIPSOM ('the Act'). They were brought before the magistrate's court whereupon an interim protection order under s 44(2) of the Act, pending investigation was granted. After ten days, the investigating officer applied for protection order under s 51(3) of the Act. The magistrate granted the order of protection for three months.

[3] Upon examining the record of proceeding, I found that only the report

from the protection officer was tendered during the application for the order. No report whatsoever was prepared by the investigating officer. The report by protection officer, inter alia, mentioned about the background of each subject, as they were from Myanmar, came to Malaysia looking for jobs since they were poor farmers in their country and hoping to improve their lives here. On that fateful day, a Malay man picked them up at Malaysian-Thai border at Rantau Panjang and heading towards Kuala Lumpur.

THE PRELIMINARY ISSUE

[4] At the outset of hearing this revision, an important point of law for consideration is whether the protection order under s 51 of the ATIPSOM applies to these four subjects and further, whether the protection order under s 51(3)(a)(ii) of the Act should in the first place be granted.

[5] Section 51 of the Act requires that investigating officer and protection officer to prepare a report jointly and produce the report to the magistrate while applying the protection order. Section 51 states that:

> 51(1) Where an interim protection order is made under subsection 44(2), within fourteen days from the date of such order —
>
> (a) an enforcement officer shall investigate into the circumstances of the person's case for the purpose of determining whether the person is a trafficked person under this Act; and
>
> (b) a Protection Officer shall enquire into the background of that person.
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> (2) Upon completion of the investigation and enquiry under subsection (1), the enforcement officer and the protection officer *shall jointly prepare a report and produce the report together* with the person before a Magistrate's Court for the purpose of satisfying the Magistrate that such person is a trafficked person under this Act. (Emphasis added.)
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> (3) Where the Magistrate, having read the report produced under subsection (2), is satisfied that the person brought before him —
>
> (a) is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order —
>
> (i) in the case of a trafficked person who is a citizen or permanent resident of Malaysia, ordering that such trafficked person be placed in a place of refuge for a period not exceeding two years from the date of the order; or
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> (ii) in the case of a trafficked person who is a foreign national, ordering that such trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order, and thereafter to release him to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63,

A (b) is not a trafficked person, the Magistrate may —

(i) in the case of a person who is a citizen or permanent resident of Malaysia, order that person to be released; or

B (ii) in the case of a person who is a foreign national, order that person to be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63.

C **[6]** During the proceeding at the magistrate's court, only a report from protection officer was furnished. No report was prepared by the investigating officer even though 14 days interim protection order was granted under s 44 to enable them to investigate into the circumstances of the subjects for the purpose of determining whether they were trafficked person under the Act.

D **[7]** The report by the protection officer did not disclose anything about the circumstances of trafficking in person. It only stated the background of the subjects. No single element of trafficking in person can be extracted from the background of the subjects as reported by the protection officer. In hearing E protection order application, magistrate must consider not only the report from the protection officer but also to the report by investigating officer. See the case of *Public Prosecutor v Nam Ointhantip* [2008] 5 CLJ 285 where it was decided that the magistrate has to look into the report of investigating officer, in granting the order.

F **[8]** The magistrate has erred in law in granting the order as he only assumed those subjects need protection, after receiving the report from the officer without scrutinising and examining the details of the report tendered. Receiving the report alone is not sufficient. On the surface of the record, the G magistrate erred when he considered that he was satisfied that the subjects were trafficked persons and in need of protection, whereas the report on that matter was never offered. By doing so, the magistrate was not exercising his judicial mind.

H **[9]** The report from investigating officer is utmost important beside one from the protection officer as it would disclose the circumstances and activities of the subjects and from there the magistrate can ascertain whether the subjects were trafficked person and whether they were in need of protection or not. Since there was no report from the investigation officer, the consideration of I whether the subjects were trafficked persons and need protection is not sufficiently evaluated and the decision of granting the protection order was therefore not properly arrived at. In granting the protection order, the magistrate had acted on blind faith and assumed that the subjects were trafficked person only vide the report by the protection officer which

incidentally is the only report available to him. Considering the phrases 'trafficked person' and 'in need of protection' as stated in s 51(3) of the Act, the magistrate has no basis to decide there were grounds to be satisfiedthat the subjects should be protected. Section 51(3) states:

> 51 (3) Where the Magistrate, having read the report produced under subsection (2), is *satisfied* that the person brought before him —
>
> [a] is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order —
>
> (Emphasis added.)

[10] I believe the word 'satisfied' in s 51(3)(3) is lesser than what is required to achieve the prima facie's standard but the magistrate still has to put his mind and evaluate whether at the very least, on the surface of the report tendered during the application, whether the facts revealed some circumstances whichshow the subject was a trafficked person and need protection. The reason being for example, from both reports (the investigating officer and protection officer), if the subjects while they were arrested, revealed that their purpose of entry to Malaysia is to join their family or working as a laborer or they are the children coming to join their families or illegal workers just taking leave to go back to their countries, or any other possible reasons, there could not be any evidence to suggest that they were being exploited as to presume they were trafficked person. The scenario in the case of *Siti Rashidah bt Razali dan yang lain lwn Pendakwa Raya* [2011] 6 MLJ 417; [2011] 9 CLJ 459 is an example where no exploitation was involved. Persons arrested were not trafficked person in that case. They were not in need of protection! The fact of that case was that ten adults and three children were arrested in the house of appellants as they have no travel document. From the statement of those subjects they came to Malaysia to look for a job and one of them came along with her three daughters to join her husband who has been working here for some time. They were treated well by the appellants. They were provided food, shelter and free to watch television and even free to go out. From the subjects' statement there was no single piece of evidence showing exploitation has been practiced upon them. They were not trafficked person. They do not want the protection by the Malaysian authorities. What they actually want was to get jobs and the wife want to accompany her husband and the children want to be with their father.

[11] It is important to appreciate that protection order is not simply to protect persons who were not in need of protection and where no substantial activity lead to the substantial offence of trafficking in person was revealed. It is necessary to understand clearly the purpose ofprotection. It is to save person trapped in activities of trafficking in person. If the subject enters into Malaysia without travel document or permit, that does not straight away make them a victim or a trafficked person and should be protected. See *Siti Rashidah bt*

A *Razali dan yang lain lwn Pendakwa Raya* [2011] 6 MLJ 417; [2011] 9 CLJ 459, trafficking in person is defined under s 2 of the Act. Those elements of trafficked person should be looked into in determining whether the protection is needed or not.

B **[12]** The object of the protection order is to protect the subject from being exploited or continuously exploited. If from the investigation, the subject does not fall under the definition of trafficked person and only comes under the definition of illegal immigrants, then no protection order should be granted. If the magistrate found that the subjects are only illegal immigrants, they C shouldn't be placed at protection home, but to be in immigration deport waiting to be sent back to their countries or to be prosecuted. By ordering them to be placed under protection home, it defeats the purpose of establishing the protection scheme itself, and the subjects instead of getting the job or sent to their countries, or treated as illegal immigrant will get the special treatment of D protection.

[13] Section 41A states: 'This Part shall not apply to a smuggled migrant unless such smuggled migrant is a trafficked person'. Therefore, provisions of protection order do not apply to these four subjects as they were not trafficked E person and protection order is set aside.

Application allowed and protection order set aside.

F Reported by Ashgar Ali Ali Mohamed

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